STATE OF MICHIGAN

COURT OF APPEALS

APPLEGATE, INC.,

Plaintiff-Appellant/Cross-Appellee,

v

JOHN M. OLSON COMPANY, d/b/a J. M. OLSON CORPORATION and FEDERAL INSURANCE COMPANY,

Defendants-Appellees/Cross-Appellants,

and

METRO INDUSTRIAL PIPING, INC., MAUREEN E. RENKIEWICZ, and STEVEN H. LOWE,

Defendants.

UNPUBLISHED
January 31, 2008

No. 275098
Washtenaw Circuit Court
LC No. 04-000541-CH

Before: Fitzgerald, P.J., and Markey and Smolenski, JJ.

PER CURIAM.

In this action on a surety bond, plaintiff, Applegate, Inc., appeals as of right the November 13, 2006, order denying plaintiff's motion for summary disposition and granting summary disposition in favor of defendants, John M. Olson Company (Olson) and Federal Insurance Company, under MCR 2.116(C)(10), on the ground that plaintiff failed to comply with the 90-day notice requirement in § 7[1] of the public works bond statute, MCL 129.201 *et seq.* Defendants cross-appeal the January 20, 2006, order denying defendants' motion for summary disposition and granting summary disposition pursuant to MCR 2.116(I)(2) in favor of Applegate on the ground that plaintiff complied with the 30-day notice requirement of § 7.

---

[1] MCL 129.207.

Washtenaw Community College entered into a contract with Olson, as a general contractor, to renovate the college's Liberal Arts/Science Building (the project). Pursuant to the public works bond statute, Olson obtained a payment bond with Federal as the surety. Olson entered into a subcontract with Metro Industrial Piping, Inc (Metro), which in turn contracted with plaintiff on March 21, 2003, to perform sheet metal work on the project.

On April 29, 2003, plaintiff sent to Olson a "First Notice of Reliance on Bond" informing Olson that plaintiff contracted with Metro to "supply labor and materials for the sheet metal scope of work of Washington [sic] Community College-Liberal Arts & Sciences Building Renovations located in the City of Ann Arbor, County of Washtenaw, Michigan." Olson received the notice on May 1, 2003.

In June 2003 Metro submitted to Olson an Application for Payment in the amount of $808,555.50, which included $306,360.00 that was due plaintiff.[2] On August 6, 2003, Olson made payment to Metro, but Metro did not make payment to plaintiff.

On November 13, 2003, Metro sent a letter to Olson rejecting the contract with Olson "pursuant to the filing of Chapter 11 bankruptcy and the advice of our legal counsel." Metro also advised that it would be rejecting the contract with plaintiff. Plaintiff apparently continued to work on the project thereafter under direct contract with Olson.

On April 13, 2004, plaintiff sent to Olson, Federal, and Washtenaw Community College a "Second Notice of Reliance on Bond." Olson received the notice on April 14, 2004, and Federal received the notice on April 22, 2004. The notice informed defendants and the college that plaintiff was under subcontract to Metro and that plaintiff supplied

> labor and materials for the sheet metal scope of work on Washington [sic] Community College-Liberal Arts & Sciences Building, Renovations located in the City of Ann Arbor, County of Washtenaw, Michigan.
>
> This letter is intended to give the principal contractor, J M Olson Corporation, notice within 90 days of our completion of said work in compliance with P.A. 213 of 1963 (MSA 5.2321, *et seq*.).

Plaintiff commenced the present action in May 2004. The only claim in plaintiff's second amended complaint that is relevant on appeal is plaintiff's claim on the payment bond. Plaintiff alleged that plaintiff's first day of providing labor or material to the project was April 2, 2003, and that plaintiff timely served its first notice upon Olson and Federal on April 30, 2003. Plaintiff also alleged that plaintiff's last day of providing labor or materials to the project was March 12, 2004, and that plaintiff timely served its second notice upon Olson and Federal on April 13, 2004. Accordingly, plaintiff claimed that it fulfilled the statutory requirements for payment from the Federal bond.

---

[2] Thereafter, Olson issued joint checks to Metro and plaintiff, or issued direct payments to plaintiff.

Olson and Federal filed a renewed motion for summary disposition on August 31, 2005, asserting that plaintiff failed to comply with the 30-day notice requirement of § 7. Defendants maintained that plaintiff's own records reflected that on-site demolition work was performed under the contract by its employees during the week of March 5 – 12, 2003. Plaintiff opposed the motion, asserting that the on-site demolition work was performed before the contract with Metro was executed, that the demolition work was "minor demolition" consisting of "one day by 3 men and all pre-construction." Plaintiff also asserted that Olson had written notice of plaintiff's status as a subcontractor as early as February 25, 2003. Plaintiff further asserted that Olson had sufficient written information as of March 7 and March 13, 2003, to satisfy the statutory notice requirements.

In an order entered on January 20, 2006, the court denied defendants' motion and granted summary disposition in favor of plaintiff, finding that plaintiff complied with the 30-day notice requirement of § 7. Thereafter, defendants filed a motion for summary disposition, asserting that the claim against the payment bond should be dismissed because plaintiff failed to comply with the 90-day notice requirement of § 7 and because the notice did not include the amount claimed. In an order entered on November 13, 2006, the court granted summary disposition in favor of defendants on the ground that the April 13, 2004, notice failed to include the amount claimed and therefore failed to comply with § 7. The court failed to make a ruling with regard to whether plaintiff complied with the 90-day notice requirement of § 7. The trial court granted plaintiff's motion for stay pending appeal.

Plaintiff first argues that the trial court erred by granting summary disposition in favor of defendants on the ground that plaintiff failed to comply with the 90-day notice requirement of MCL 129.207.

This Court reviews de novo the circuit court's decision on a motion for summary disposition. *Dressel v Ameribank,* 468 Mich 557, 561; 664 NW2d 151 (2003). In doing so, a court must consider the pleadings, affidavits, depositions, admissions and other documentary evidence submitted in the light most favorable to the nonmoving party. *Corley v Detroit Bd of Ed,* 470 Mich 274, 278; 681 NW2d 342 (2004). Summary disposition of all or part of a claim or defense may be granted when "[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." MCR 2.116(C)(10). This Court reviews questions of statutory interpretation de novo. *Feyz v Mercy Mem Hosp,* 475 Mich 663, 672; 719 NW2d 1 (2006).

MCL 129.207 states in pertinent part:

> A claimant not having a direct contractual relationship with the principal contractor shall not have a right of action upon the payment bond unless (1) he has within 30 days after furnishing the first of such material or performing the first of such labor, served on the principal contractor a written notice, which shall inform the principal of the nature of the materials being furnished or to be furnished, or labor being performed or to be performed and identifying the party contracting for such labor or materials and the site for the performance of such labor or the delivery of such materials, and (b) *he has given written notice to the principal contractor and the governmental unit involved within 90 days from the date on which the claimant performed the last of the labor or furnished or*

> *supplied the last of the material for which the claim is made, stating with substantial accuracy the amount claimed and the name of the party to whom the material was furnished or supplied or for whom the labor was done or performed*. Each notice shall be served by mailing the same by certified mail, postage prepaid, in an envelope addressed to the principal contractor, the governmental unit involved, at any place at which said parties maintain a business or residence. The principal contractor shall not be required to make payment to a subcontractor of sums due from the subcontractor to parties performing labor or furnishing materials or supplied, except upon the receipt of the written orders of such parties to pay to the subcontractor the sums due such parties. [Emphasis added.]

Thus, the statute has two notice requirements: the first to the principal contractor within 30 days after furnishing the first of such material or performing the first of such labor, and the second to the principal contractor and the governmental unit involved within 90 days from the date on which the claimant performed the last of the labor or furnished or supplied the last of the material for which the claim is made. This issue involves the second notice requirement.

Plaintiff alleged in its complaint that the last day it provided labor or materials to the project was March 12, 2004, and that the second notice was sent on April 13, 2004. Defendants asserted, however, that plaintiff's contract with Metro was terminated by Metro on November 13, 2003, and that after that date plaintiff performed work directly for and was paid by Olson. Thus, defendants asserted that plaintiff's last date of work for Metro was November 13, 2003, and that plaintiff did not comply with the 90-day notice requirement in § 7. Defendants also asserted that the notice failed to provide the amount claimed and therefore failed to satisfy the strict requirements of § 7.

Although the date on which plaintiff last performed labor or materials on the project was in dispute, the trial court did not grant summary disposition in favor of defendants on the ground that plaintiff failed to comply with the 90-day notice requirement in § 7. Rather, the trial court granted summary disposition in favor of defendant on the ground that the notice did not provide any amount claimed.

Although the notice requirement in § 7 is strictly enforced, *Tempco Heating & Cooling, Inc v A Rea Constr, Inc*, 178 Mich App 181, 190; 443 NW2d 486 (1989); *Charles W Anderson C v Argonaut Ins Co*, 62 Mich App 650, 651-654; 233 NW2d 691 (1975), the remedial bond act is "liberally construed" to "protect contractors and materialmen in the public sector." *W T Andrew Co, Inc v Mid-State Surety Corp*, 450 Mich 655, 659; 545 NW2d 351 (1996).

To ensure that "principal contractors [have] knowledge regarding any possible claims to which their bonds might later be subjected," § 7 requires subcontractors and materialmen to comply with the four substantive elements of the notice provisions as stated in *Pi-Con, Inc v A J Anderson Constr Co*, 435 Mich 375, 383-384; 458 NW2d 639 (1990)[3]:

---

[3] In *Square D Environmental Corp v Aero Mechanical, Inc*, 119 Mich App 740; 326 NW2d 629 (continued…)

> [W]e hold that a claimant on a bond may maintain an action on the bond upon establishing compliance with four substantive elements of the notice provisions of MCL 129.207; MSA 5.2321(7). First, a claimant must prove that the principal contractor actually received notice. Second, the notice must relate "the nature of the materials being furnished or to be furnished, or labor being performed or to be performed and identify[ ] the party contracting for such labor or materials and the site for the performance of such labor or the delivery of such materials. . . . Third, the notice sent must have been written. Fourth, the notice must have been received within the time limits prescribed by statute.

With regard to the second element, which is at issue in the present case, the Court stated:

> The second element, regarding the detail required in the notice, was clarified in *Wheeling* [*People ex rel. Wheeling Corrugating Co v W L Thon Co,* 307 Mich 273; 11 NW2d 286 (1943)], where this Court stated that conversation between the general contractor and the surety regarding the several parties furnishing materials on the project could not fulfill the notice requirement. The conversations did not comply with the notice requirement because they were "of a very general nature . . . with nothing specific being said as to the amount or character of any of these claims." *Wheeling,* 307 Mich at 277; 11 NW2d 886.

See *W T Andrew Co, Inc v Mid-State Surety Corp,* 221 Mich App 438, 441; 562 NW2d 206 (1997) (a claimant on a bond may maintain an action on the bond upon establishing compliance with four substantive elements of the notice provisions).

Here, there is no dispute that the 90-day notice did not "state with substantial accuracy the amount claimed." However, the notice did comply with the four substantive elements of the notice provision set forth in *Pi-Con.* Additionally, plaintiff submitted evidence demonstrating that Olson had actual and written notice of the debt and the amount claimed. Specifically, plaintiff provided a "pay application" submitted by plaintiff to Metro on June 16, 2003, in which plaintiff applied for payment for its June draw. Metro submitted an "application and certificate for payment" in the total amount of $808,555.50 to Olson on June 30, 2003. The application was accompanied by a "contractor notarized sworn statement" that indicated that plaintiff was to be paid $306,360.00 of the total amount. Metro received the payment from Olson on August 6, 2003, but failed to remit funds to plaintiff that were specifically earmarked for plaintiff.

After Metro failed to pay plaintiff for the June 2003 draw, plaintiff contacted Olson directly. In an August 14, 2003, letter, plaintiff advised Olson's project manager that if it did not receive payment from Metro it would pull off the project. In an August 26, 2003, letter, plaintiff

---

(…continued)

(1982), this Court held that strict compliance with the provisions of MCL 129.201 *et seq.*, is required as a prerequisite to recover against a payment bond. This Court concluded that the fact that the general contractor had actual knowledge of the materials furnished or to be furnished, of the labor performed or to be performed, and the site of such labor and materials used was insufficient to satisfy the statute and that strict compliance with the notice requirement was necessary. However, *Square D* was decided before *Pi-Con, supra.*

advised Olson's controller that plaintiff was a subcontractor of Metro on the project, that it had not received the June 2003 draw of $306,360.00, that a joint check agreement should be put into place so that all future payments would be made payable to both Metro and plaintiff, and that plaintiff had enclosed copies of outstanding invoices to support the debt.

On October 22, 2003, Olson responded to a request by Metro for the release of "retention" funds by providing a list of required contingencies. Olson demanded, among other things, evidence of current payment to Metro's subcontractors, and removal of all bond claims by Metro's subcontractors. On November 6, 2003, plaintiff again demanded payment for the June 2003 draw from Metro, and provided a copy of the letter to Olson.

On November 13, 2003, Metro sent correspondence to Olson advising that it was filing for Chapter 11 bankruptcy and was rejecting its contract with Olson as well as the contracts with Metro's subcontractors. Olson called a meeting on November 26, 2003, of all of Metro's subcontractors and suppliers to discuss Metro's situation and outstanding amounts owed to subcontractors and suppliers. Representatives from both Olson and the college attended the meeting.

John Olszewski, Vice President of Operations for Olson, advised Metro's subcontractors at the meeting that Olson would be assuming all of Metro's contracts and that it was Olson's intent to "honor Metro's commitments to all subcontractors and suppliers who have provided a perfected Notice of Furnishing [sic] including those who have not." Subcontractors were asked to provide Olson with copies of contracts, change orders, purchase orders, billing histories, and quotes for extras. On the same date as the meeting, plaintiff forwarded to Olson copies of its subcontract with Metro, all billings, a payment history, sworn statements, and the Second Notice of Reliance on Bond. Olszewski testified at his deposition that he was aware at this point of Metro's failure to remit the June 2003 payment to Applegate. Plaintiff also submitted a document created by Olson entitled "Metro Industrial Piping Contract Analysis" dated February 3, 2004. The spreadsheet listed "Funds paid to Metro but not forwarded to their subcontractors," and indicated that $306,360.00 was due plaintiff. And, a document created by Olson entitled "Metro Industrial Piping, Inc., November Accounts Payable," dated March 20, 2004, includes plaintiff's June 2003 draw request in the amount of $306,360.00 as an account payable. Under these circumstances, the trial court erroneously granted defendants summary disposition on the ground that the second notice did not include the amount claimed because the second notice and the documents discussed above suffice as the "notice" mandated by the statute's second notice requirement.[4]

Defendants' reliance on *Thomas Industries, Inc v C & L Electric*, 216 Mich App 603; 550 NW2d 558 (1996), to support the contention that mere knowledge that a party had furnished materials is not sufficient to comply with the notice requirements of § 7 is misplaced. *Thomas* is factually distinguishable. In that case, the plaintiff supplied materials to a subcontractor of the general contractor. The plaintiff "drop-shipped" these materials, with packing slips attached,

[4] Because the trial court did not address any alternative grounds for summary disposition, any arguments regarding alternative grounds for summary disposition can be addressed on remand.

directly to the general contractor at the construction site. The packing slips were "checked against the actual parts for delivery purposes, then they were put into the job file at the construction site by the electrician." *Id.* at 605. The general contractor allegedly made a final payment to the subcontractor, but the subcontractor did not pay the plaintiff for the supplied materials. The plaintiff notified the general contractor of its unpaid claim by certified letter.

The plaintiff argued that the packing slips enclosed with the supplies contained a description of the materials shipped, identified the party contracting for the materials, and indicated the address of the job site or place of delivery, and, therefore, constituted sufficient notice as required under § 7. The general contractor argued, in part, that the packing slips did not constitute proper notice because they were not mailed as required by § 7. The plaintiff responded that the general contractor received "actual" notice that complied with the underlying concern of the notice requirement. *Id.* at 609. The trial court held that the packing slips did not constitute "adequate notice" or advised the general contractor of a claim. *Id.* at 605. Under the facts of the case, this Court agreed:

> Although the packing slips in the present case contain the information required by condition a of § 7, the purpose of the packing slip is to ensure mailing and delivery of the precise material ordered; that is, the packing slip only purports to constitute notice of the contents of the package. While the packing slips were actually received by Strayer, a field employee, they were apparently regarded by him as simply packing slips and not as notice under the statute. Thus, under the facts of this case, the packing slips delivered to the job site do not fulfill the purpose of the notice requirement of condition a of § 7.

Unlike *Thomas*, the general contractor in the present case received the second notice and had documentary evidence providing the substantive elements of the notice as well as the amount of the claim.

Plaintiff also argues that the trial court erred by granting summary disposition in favor of Olson because an implied or guarantee contract existed between plaintiff and Olson that was supported by written and oral evidence. Although the trial court addressed plaintiff's argument that a contract should be implied, the argument was raised in response to defendant's argument that there was no contract between plaintiff and Olson that could support plaintiff's claim for breach of contract. Plaintiffs' contention regarding an implied contract cannot survive based on plaintiffs' failure to plead a claim for breach of implied contract in either its original or amended complaints. Thus, this argument is without merit.

On cross-appeal, defendants argue that the trial court erred finding that there was no genuine issue of fact with regard to whether plaintiff complied with the 30-day notice requirement in § 7. Plaintiff alleged in its complaint that its first day of providing labor or materials to the project was April 2, 2003, and that Olson received plaintiff's first notice of reliance on bond on May 1, 2003.

Defendant moved for summary disposition, arguing that plaintiff provided its first labor or material to the project before April 1, 2003, and, therefore, that the first notice was untimely. They relied on several documents in support of their argument. They relied on plaintiff's superintendent's testimony that plaintiff performed demolition work at the site pursuant to their

contract with Metro during the week ending March 12, 2003. They also relied on plaintiff's "History Detail Report," detailing the work performed by employees on the project and the date the work was performed. The document indicated that plaintiff's employees performed work under the contract on February 19, 2003, February 26, 2003, March 5, 2003, and March 26, 2003, and that employees performed work at the site before March 12, 2003. They also relied on plaintiff's March 21, 2003 "Job Cost Detail Report" indicating labor costs-to-date for the project in the amount of $10,506.

In response, plaintiffs asserted that plaintiff's first day of providing labor and materials to the project was supported by plaintiff's subcontract agreement with Metro and the affidavit of plaintiff's assistant controller, Linda Blumenfeld, in which Blumenfeld averred that the first day plaintiff provided labor materials to the project was April 2, 2003. Plaintiff also asserted that the subcontract agreement was not executed until March 21, 2003, and plaintiff did not receive a signed copy of the agreement until April 12, 2003. Plaintiff also asserted that administrative documents prepared during the project supported plaintiff's assertion regarding the first day of providing labor or materials to the project. It relied on Metro's first "Contractor Notarized Sworn Statement" for draw number one from Olson, which indicated those subcontractors of Metro owed money as of March 21, 2003. Plaintiff asserted that plaintiff was not among those subcontractors requiring payment because plaintiff "had not yet billed for labor or materials on site at that time." With regard to plaintiff's superintendent's deposition testimony that plaintiff was on site for demolition work the week of March 5 – March 12, 2003, plaintiff maintained that the minor demolition work consisted of one day of work by three men and was all pre-construction, and that the first day of providing labor and materials pursuant to the subcontractor agreement was April 2, 2003.

Plaintiff also argued that even without the first notice, Olson had ample written notice of plaintiff's identity and scope of work as early as February 25, 2003. First, plaintiff relied on "Subcontractor Meeting Minutes" of meetings called by Olson for meetings held on March 11, 18, and 25, 2003, at which plaintiff's superintendent was in attendance on behalf of plaintiff. Second, it relied on a "Fax/Memo" dated March 7, 2003, from Olson to "All Subcontractors" in which Olson requested that all subcontractors provide a 24-hour emergency phone number. According to plaintiff, plaintiff provided its company name and contact person and emergency contact number to Olson on March 12, 2003, on the same form sent by Olson. Olson then created a March 17, 2003, document entitled "J.M. Olson Corp. Emergency Phone Listing" for the project. Third, it relied on a "Fax Transmittal" from Metro's project manager to Olson's project manager listing plaintiff as a supplier of various "Sheet Metal Drawings." Fourth, it relied on correspondence documents directly from Olson, including a letter from Olson to Metro making reference to correspondence received from plaintiff on April 4, 2003. Fifth, it relied on a "Request for Information" (RFI) submitted by plaintiff to Olson on March 13, 2003, asking Olson to provide plaintiff with clarification with respect to a structural layout issue so plaintiff could move forward with sheet metal detailing and fabrication. Olson provided an answer to plaintiff on March 14, 2003. Plaintiff submitted a second RFI to Olson on March 14, 2003, to which Olson responded on March 20, 2003.

The trial court, citing *Pi-Con*, *supra*, found that, even assuming that plaintiff first provided labor or materials to the project during the week of March 5-12, 2003, and that the first notice was not sent within 30 days of that date, the written documents provided by plaintiff to

Olson conveyed all of the statutorily required information within the statutory time limits. The documents cited by plaintiff and the trial court fulfilled the purpose of the first notice requirement of § 7. Thus, substantial compliance with the terms of the statute was established.[5]

The November 13, 2006, order granting summary disposition in favor of plaintiff is affirmed. The January 20, 2006, order granting summary disposition in favor of defendant is reversed and the case is remanded to the trial court for further proceedings. Jurisdiction is not retained.

/s/ E. Thomas Fitzgerald
/s/ Jane E. Markey
/s/ Michael R. Smolenski

[5] Defendants assert that plaintiff is precluded from recovery because of a "Partial Unconditional Waiver" executed by plaintiff on May 26, 2004, upon payment by Olson of $206,877.00 for work performed by plaintiff directly for Olson. There is no indication that plaintiff waived its right to assert a bond claim for the amount unpaid by Metro for the June 2003 payment due.